

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|--|---|--------------------|
| HELEN WILLIAMS |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 193,296 |
| W.I.S.B. |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| CIGNA PROPERTY & CASUALTY COMPANY |) | |
| Insurance Carrier |) | |
| AND |) | |
| |) | |
| KANSAS WORKERS COMPENSATION FUND |) | |

ORDER

Respondent appealed the Award entered by Special Administrative Law Judge Douglas F. Martin on November 14, 1996. The Appeals Board heard oral argument by telephone conference on April 22, 1997.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, Kurt W. Ratzlaff of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Paul V. Dugan, Jr., of Wichita, Kansas. The claimant did not appear as he previously settled his claim against the respondent.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations as listed in the Award.

ISSUES

The liability of the Kansas Workers Compensation Fund (Fund) is the only issue before the Appeals Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant injured her back on June 7, 1994, when she lifted a bundle of 100 aprons from a cart to the table while employed by the respondent. Claimant had been employed by the respondent as a sewing machine operator since 1987. Claimant received treatment, provided by the respondent, with Robert L. Eyster, M.D., of Wichita, Kansas.

On March 3, 1995, the claimant settled her claim for workers compensation benefits with the respondent for a lump sum amount of \$25,000 based on a 40 percent work disability. All issues between the respondent and the Fund were reserved for future determination.

For the respondent to shift liability to the Fund for an award, the respondent has the burden to prove that it knowingly hired or retained a handicapped employee. See K.S.A. 44-567(b). An employee is considered handicapped if he or she is afflicted with an impairment which constitutes a handicap in obtaining or retaining employment. See K.S.A. 44-566(b). The employer then must prove that the preexisting handicap either caused or contributed to the subsequent work-related injury or disability. See K.S.A. 44-567(a)(1)(2).

At the time of her injury, claimant was 66 years of age. She testified she had suffered a work-related back injury in 1978 while employed by a previous employer. Claimant received medical treatment for that injury in the form of traction and physical therapy. Claimant testified she did not have any permanent restrictions placed on her as a result of that injury. Furthermore, claimant testified she returned to jobs following that injury that required her to perform heavy physical duties and she remained asymptomatic. Furthermore, claimant denied that she had any back problems while she was employed with the respondent before her June 7, 1994, injury. Claimant testified she lifted heavy materials without any problems from 1987 until the date of her accident in 1994. She testified she was tired following a full day of work but attributed this symptom to her age. Claimant denied that the respondent provided her with any help when she was required to do heavy lifting. Also, claimant denied that she had a bad back before the June 7, 1994, accident. In fact, claimant specifically declared during her deposition testimony that "I didn't have a bad back."

In contrast, the respondent presented the testimony of Diana L. Onesloger, lead person in the sewing department. Ms. Onesloger was claimant's supervisor on the date of claimant's accident and had been her supervisor for some two-and-a-half years.

Ms. Onesloger testified she had known since 1991 that claimant had back problems. Ms. Onesloger also testified that she had other employees help the claimant when claimant was required to do heavy lifting. Respondent has a policy that all employees, who are required to lift, are required to wear a back brace. Ms. Onesloger testified, that at the time the respondent provided the back braces to the employees, the claimant received a back brace that was more restrictive because of her back problems.

Respondent presented the testimony of claimant's treating physician, orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster had treated claimant conservatively and released her with a permanent functional impairment rating of 8 percent as the result of claimant's June 7, 1994, work-related accident. Dr. Eyster also released claimant with permanent restrictions. The doctor opined that 80 percent of claimant's permanent functional impairment was due to preexisting degenerative disc disease and 20 percent was the result of the June 7, 1994, accidental injury.

On the other hand, the Fund presented the testimony of Lawrence R. Blaty, M.D., who examined the claimant with the benefit of claimant's medical treatment records which included Dr. Eyster's medical records. Dr. Blaty diagnosed claimant with a chronic diffuse upper and lower back strain with generalized symptomatology. Dr. Blaty admitted that claimant, because of her age, had some degree of degenerative disc disease. However, Dr. Blaty testified that the claimant's degenerative changes did not cause or contribute to her June 7, 1994, back injury and resulting disability. Dr. Blaty opined that claimant's June 7, 1994, accident resulted in a muscle strain and any episodes claimant had before that accident were also muscle strains. Additionally, Dr. Blaty opined that claimant's prior episodes including her 1978 injury did no permanent damage.

The Special Administrative Law Judge found the respondent through Dr. Eyster's testimony had failed to overcome the contradictory testimony of Dr. Blaty, that claimant's preexisting degenerative disc disease had not caused or contributed to claimant's resulting disability.

The Appeals Board affirms the Special Administrative Law Judge's Award that the respondent failed to prove Fund liability. However, the Appeals Board affirms the Award for different reasons as set forth below.

The first question the Appeals Board will address is whether claimant before the June 7, 1994, injury was a handicapped employee as defined by K.S.A. 44-566. If claimant was not a handicapped employee before her June 7, 1994, accident then K.S.A. 44-567(a)(1) or (2) will not relieve the respondent of liability for this Award. The Appeals Board finds that the most credible and persuasive evidence in the record is the testimony of the claimant and Dr. Blaty. This testimony established that claimant did not have a preexisting impairment before the June 7, 1994, injury. The claimant testified that she was tired following work but this symptom was due to old age and not due to a preexisting back

problem. Dr. Blaty opined that claimant had some degenerative changes in her back but those changes were attributed to her age and did not contribute or cause her resulting back strain. Although claimant had a previous back injury in 1978, she established through her testimony that she recovered from that injury and had no permanent restrictions or symptoms following that injury. A single back injury does not necessarily affect one's work ability or employment possibilities and cannot be assumed to have recurring effects. See Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 607, 621 P.2d 448 (1980). Therefore, the Appeals Board concludes the most persuasive evidence in the record established that before claimant's June 7, 1994, work-related accident she was not a handicapped employee as defined by K.S.A. 44-566.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated November 14, 1996, entered by Special Administrative Law Judge Douglas F. Martin should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kurt W. Ratzlaff, Wichita, KS
Paul V. Dugan, Jr., Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director